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No. 82-1411

# Supreme Court of the United States

October Term, 1982

ROBERT J. KONDRAT,

*Petitioner,*

vs.

RICHARD MARTINET,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI  
To THE SUPREME COURT OF OHIO

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## **QUESTIONS PRESENTED**

1. When a municipality expends public funds in defense of a public official, and Petitioner wishes to prevent the expenditure, is the Petitioner estopped from denying that the public official is acting within the scope of his official duties where, in a prior action involving the Petitioner, the court resolved the issue?

2. May the Petitioner raise issues on review which he did not raise in the trial court?

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**No. 82-1411**  
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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF OHIO**

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**BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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**OPINIONS BELOW**

The Ohio Supreme Court in Case No. 82-1655 on January 26, 1983, overruled Petitioner's Motion for an order directing the Court of Appeals for Lake County, Ohio, to certify its record.

On October 18, 1982, the Eleventh District Court of Appeals of Ohio, in Case No. 9-022, affirmed the Summary Judgment granted by the Lake County Common Pleas Court on September 9, 1981 in Case No. 79-CIV-0932.

**JURISDICTIONAL STATEMENT**

Petitioner filed a Petition for a Writ of Certiorari on February 22, 1983, pursuant to 28 U.S.C. §1254.

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**

No constitutional issues were raised or argued by Petitioner in the courts below.

## **STATEMENT OF THE CASE**

In 1979, Petitioner filed *Kondrat, et al. v. O'Ryan*, No. 79-CIV-0087 (Lake Co. C.P. 1979), in which he and a co-plaintiff alleged that they were defamed as a result of remarks made by a Willoughby Hills councilman during the course of a council meeting. The trial court determined that the remarks were shielded by legislative privilege because the statements were made during the course of a Willoughby Hills city council meeting and were relevant to the subject matter under discussion. Subsequently that decision was affirmed in *Kondrat v. O'Ryan*, No. CA 8-107 (Lake Co. Ct. App. 1981), and a Motion to Certify the case for review was denied by the Ohio Supreme Court in No. 81-802 (1981).

Subsequent to that case, the same plaintiff filed this suit against Respondent, Finance Director for the City of Willoughby Hills, seeking an injunction to prevent the expenditure of municipal funds in defense of the councilman in the defamation lawsuit. Petitioner alleged that because the underlying lawsuit was based on a claim of defamation, the councilman was acting beyond the scope of his authority as a public official, and was therefore not entitled to a defense funded by public monies.

Respondent, Finance Director, moved for summary judgment, which motion was granted, and judgment was entered on September 9, 1981.

Petitioner appealed the judgment to the Lake County Court of Appeals on the theory that Petitioner had been denied a constitutional right because the use of Petitioner's tax monies against Petitioner was akin to compelling Petitioner to be a witness against himself.

On October 18, 1982, the Court of Appeals affirmed the summary judgment entered by the trial court.

Petitioner then appealed to the Ohio Supreme Court, which overruled Petitioner's Motion for an Order Directing the Court of Appeals to Certify its Record.

Respondent now files this Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

### **ARGUMENT**

- 1. PETITIONER IS ESTOPPED FROM DENYING THAT THE PUBLIC OFFICIAL IN THE UNDERLYING LAWSUIT OF THIS TAXPAYER ACTION WAS WITHIN THE SCOPE OF HIS OFFICIAL DUTIES, AND THEREFORE, THE MUNICIPALITY MAY EXPEND FUNDS IN THE DEFENSE OF THE PUBLIC OFFICIAL.**

As a result of Petitioner's original defamation suit, it was determined that the alleged defamatory remarks were shielded by legislative privilege because the statements were made during the course of a city council meeting and the councilman was acting within the scope of his duties in discussing an issue before the city council.

After filing the defamation case, the same Plaintiffs then filed this suit seeking to prevent Respondent, the Finance Director of the City of Willoughby Hills, from expending public funds for attorney fees in defending the

councilman in the defamation case on the theory that the councilman was outside the scope of his official duties.

Under the doctrine of collateral estoppel, where an issue of fact or law is actually litigated and determined by a valid and final judgment, such determination being essential to that judgment, that determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. *Hicks v. De La Cruz*, 52 Ohio St. 2d 71 (1977); *Trautwein v. Sorgenfrei*, 58 Ohio St. 2d 493 (1979). In the case at bar, the Plaintiff is attempting to relitigate the same issue of fact that was determinative in the earlier defamation suit. Therefore, Petitioner is estopped from raising the issue of whether the councilman was acting within the scope of his official capacity in the action to prevent expenditure of funds when that issue had already been decided against Petitioner in the defamation suit.

It is well settled in Ohio that municipal funds may be expended in the defense of a lawsuit against a public official when the public official is acting within the scope of his official capacity. *State, ex rel. Flagg v. Bedford*, 7 Ohio St. 2d 45 (1966); See also: *Costanzo v. Gaul*, 62 Ohio St. 2d 106 (1980). Thus, Respondent in the instant case may authorize the expenditure of funds for the defense of the councilman where it has been determined that the councilman was acting within the scope of his official capacity at the time of the remarks complained of.

## **2. AN ARGUMENT MAY NOT BE RAISED ON REVIEW WHERE IT WAS NOT RAISED IN THE TRIAL COURT.**

When Petitioner brought the original suit, he requested only an injunction against Respondent to prevent Respondent from expending municipal funds in the defense



of a lawsuit which Petitioner had filed against a councilman.

On appeal, Petitioner did not argue the merits of the issue he presented to the trial court. Instead, he theorized that the use of tax monies to defend a councilman was akin to compelling the Petitioner to be a witness against himself.

Petitioner now abandons that theory and instead claims that he has been denied due process of law and equal protection of the laws. Petitioner does not, however, offer to this Court a record to substantiate the claim or law which support his theory.

Petitioner is clearly precluded from raising issues on review that he failed to raise at the trial level.

Where an issue is not raised and tried in the lower court, it cannot be raised for the first time on review. *Republic Steel Corp. v. Board of Revision of Cuyahoga County*, 175 Ohio St. 179 (1963). Furthermore, a party, having elected to proceed under a state theory, may not, on appeal, espouse a federal theory not considered by the court below. *Kalish v. Trans World Airlines, Inc.*, 50 Ohio St. 2d 73 (1977).

When Petitioner brought his suit at the trial level, he sought an injunction under Ohio law pertaining to when a municipality could pay the defense costs of one of its public officials. On appeal and before this Court, Petitioner has raised radically different issues which were not considered, let alone adjudicated, in the trial court below. Therefore, Petitioner could not raise those issues in the state Court of Appeals, and he may not raise them now.

**3. THE ONLY LEGITIMATE ISSUE RAISED BY PETITIONER IS NOT CHARACTERISTIC OF THE REASONS FOR WHICH A REVIEW ON WRIT OF CERTIORARI WILL BE GRANTED BY THIS COURT.**

As stated *supra*, Petitioner is collaterally estopped from raising the issue of the scope of the councilman's duties. He is also precluded from raising issues that were not raised earlier and decided by the trial court. Therefore, Petitioner's only properly-raised issue is whether the Respondent acted properly in expending funds for the councilman's defense.

This issue is not so special and important that it warrants this Court's consideration. Under Rule 17 (b) and (c) of the Rules of the Supreme Court of the United States, the character of reasons for granting certiorari involve "special and important" situations in which federal issues are decided in such a way as to be in conflict with other federal or state provisions.

In the instant case, Petitioner has not raised any such issue. Therefore, this Court should deny Petitioner's Petition for Writ of Certiorari.

**CONCLUSION**

Respondent respectfully requests that this Honorable Court deny jurisdiction. The Petitioner is estopped from attempting to obtain yet another determination on the issue of whether the councilman was acting within the scope of his public office, and therefore, Respondent was correct in authorizing the expenditure of funds for the councilman's defense. Furthermore, Petitioner is pre-

cluded from raising issues not previously raised at the trial level. Finally, Petitioner has not raised any issue so important that this Court should hear it.

Respectfully submitted,

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**APPENDIX**

**OPINION OF THE COURT OF APPEALS OF  
LAKE COUNTY, OHIO**

(Filed April 27, 1981)

Case No. 8-107

**IN THE COURT OF APPEALS  
STATE OF OHIO, LAKE COUNTY  
ELEVENTH DISTRICT**

**ROBERT J. KONDRAT,**  
*Plaintiff-Appellant,*

vs.

**MORTON O'RYAN,**  
*Defendant-Appellee.*

**OPINION**

**DONOFRIO, J.**

Appeal from the Court of Common Pleas of Lake County, Ohio. This matter is before us on the briefs of the parties, oral hearing having been waived. Upon consideration of the briefs and review of the record herein, we find no error prejudicial to the plaintiff-appellant, Robert J. Kondrat, and sustain the judgment of the trial court for the following reasons.

Appellant sets forth only one assignment of error and that is in regards to the trial judge not ruling on appellant's motion for extension of time. This assignment of error apparently is directed to a second motion for extension of time that was filed. To clarify the facts of this

case we will begin with the proceedings developing early in the trial court.

The appellant and plaintiff, John Szabo, filed a pro se complaint on January 29, 1979 alleging that defendant-appellee, Morton O'Ryan, a Willoughby Hills councilman, defamed plaintiffs as a result of a statement made during the course of the Willoughby Hills council meeting.

The complaint, paragraph 1, provides:

"1. Now comes Plaintiffs ROBERT J. KONDRAT and JOHN L. SZABO, and for their Complaint state, allege and aver that on or about February 23, 1978, the Defendant, Morton O'Ryan, a Councilman in the City of Willoughby Hills, Ohio, maliciously and with intent to injure, ridicule and defame the Plaintiffs, described the Plaintiffs in an open public council meeting as the following:

"'malcontents that by using the recall process attempted to overthrow the government of Willoughby Hills' "

An answer was filed on behalf of appellee.

Requests for admission were submitted to both the appellant and plaintiff Szabo on or about January 11, 1980.

No answers were supplied to the request for admissions by appellant or plaintiff Szabo.

A pre-trial hearing was scheduled for February 15, 1980. On February 6, 1980, appellant Kondrat and plaintiff Szabo filed a motion for continuance. Appellant's claimed need for the continuance was "because (of) Plaintiff Kondrat's heavy work schedule in the Ohio Supreme Court."

Additionally, appellant objected to having pre-trial conference within Lake County and the judge scheduled for the hearing, Judge John M. Parks.

On February 15, 1980, the pre-trial was conducted before Judge Ross D. Avellone.

At this hearing the trial judge did not issue any final judgments as to the claims and defenses of the parties based on the cause of action filed. The trial judge did rule on motions and procedural matters, one of the motions being the extension of time and objection to the court and judge by the appellant. The trial court's entry states:

"Plaintiffs' motion for extension of time and 'Objection of the Court and Judge' as filed February 6, 1980 is hereby overruled and denied in part and found to be moot in part, to wit;

"The request to remove the hearing from the County of Lake is hereby denied and overruled;

"The Court finds that inasmuch as the within case was assigned to the undersigned Judge for reasons other than those advanced by plaintiff and thereby Judge John M. Parks is no longer hearing same, that said portion of motion is thereby moot;

"Further, that the request for continuance not being granted and said hearing already been had, such continuance is thereby rendered moot.

"The Court further finds that the pre-trial hearing was had this 15th day of February, 1980, as regularly docketed, with the defendant and his counsel present and plaintiffs failing to appear or attend although not having any prior leave of Court or permission for such non-appearance."

Appellant appealed the denial of his motion for continuance to this court in Case No. 8-006. Appellee filed a motion to dismiss the appeal because the judgment entry appealed was not a final, appealable order. This court granted the motion to dismiss.

Appellant next requested the Ohio Supreme Court review the decision, but that court refused jurisdiction.

Granting of continuance is within the sound discretion of the trial court. *State v. Kehn* (1977), 50 Ohio St. 2d 11; *State, ex rel. Buck v. McCabe et al.* (1942), 140 Ohio St. 535.

Thus far in the proceedings we find no error prejudicial to the appellant. As indicated there were no final judgments at the pre-trial for which the appellant was not present and where his first motion for continuance was overruled. At this hearing appellee filed a motion to dismiss and a motion for summary judgment and the matter was properly set down for future hearing by the trial judge, as indicated by the trial court's entry filed for record February 19, 1980:

"Motions as filed by defendant in open Court this 15th day of February, 1980, in the nature of a judgment on the pleadings, summary judgment and motion to dismiss are hereby set for hearing on brief written statements in support or opposition thereto, pursuant to Civil Rule 7(B), to be submitted no later than February 26, 1980."

From this point on the proceedings at the trial level were in regard to the motion to dismiss and motion for summary judgment. The appellant filed an additional motion captioned "Motion for extension of time and plaintiff's objection of the court and judge—second time." It appears that this second motion of appellant is directed to

the same hearing already held, the pre-trial hearing. It cannot be determined from reading the motion whether it is directed towards any other dates subsequent to said motion. It is this motion that appellant claims was not ruled upon and is the subject of appellant's only assignment of error.

For clarity, the motion filed February 20, 1980 is reproduced in total as follows:

"Gross abuse of power of the Lake County judicial system is well established. The prosecutor's office has been labeled a rubber-stamp operation by former Grand Jury Foreman; the recent Macko trial in which the presiding Judge refused to withdraw, although he is a named defendant in a related action and; judicial interference into a Grand Jury's proceedings to obstruct justice are all signs of a polluted system.

"The necessity and urgency of the Lake County judicial system to rescue not only the defendant in this action, but all defendants involved in the Recall litigation is understandable. For it is not only the defendants that are on trial, it is also the Lake County judiciary that is on trial. Consequently, justice is not possible under these circumstances.

"The Macko trial is an example of what may be expected when the fox is let into the hen house. This Plaintiff will not permit another chicken-coop caper. The court is asked to remove the captioned case from Lake County and from the assigned judge. This case is to be reassigned to a court and judge *meeting the satisfaction of the Plaintiff.*"

The record indicates the appellant replied to appellee's motion to dismiss and motion for summary judgment, but



without documents or evidence as per Ohio Rules of Civil Procedure, Rule 56. In that reply appellant refers again to the first motion for continuance as if it was in regards to a trial. As stated before, this particular hearing was a pre-trial. There was no final judgment entered at that hearing. Appellant did not attack in a proper manner the motion for summary judgment which was pending before the trial court.

We come now to the conclusion of the proceedings at the trial level and the trial court, by judgment entry of September 10, 1980, disposed of all motions including the motion for summary judgment in its judgment entry as follows:

"Defendant's motions as made in open Court February 15, 1980 and filed February 19, 1980 are hereby found to be well taken as hereinafter set forth.

"Motion to Dismiss—this motion is hereby granted pursuant to Rule 12.9 of the Rules of Practice of the Common Pleas Court for Lake County for failure of plaintiffs to appear at the regularly set pre-trial of February 15, 1980 with no valid excuse being offered.

"Motion for Summary Judgment—this motion is hereby granted on the basis that this is an action based on libel *per quod* and therefore special damages and economic loss must be pleaded and proved and plaintiffs have admitted through requests for admissions that they have not suffered any financial harm as a result of the remarks of defendant.

"Motion for Summary Judgment based on legislative privilege (sic)—this motion is hereby granted for the reason that admissions established that defendant was a legislator making a statement relative to a piece of legislation under consideration at a legisla-

tive meeting and therefore the case of *Tanner vs Gault* 20 Ohio App. 243 controls.

"The Court has ruled on all motions even though a ruling on any one motion in defendant's favor would dispose of the matter because an unrul'd upon motion might be procedurally confusing in this case."

Even if the court's ruling on motion to dismiss because of failure of appellant to appear at the pre-trial hearing was error, we must still consider the court's judgment as to the motion for summary judgment. That judgment appears on the record to be legally sound. There is no assignment of error directed to it but the appellant chose to bring his appeal on the grounds that he was denied continuance and change of judges.

As indicated hereinbefore, the matter of continuance is within the sound discretion of the trial court and we cannot say that the trial court erred as the proceedings unfolded and the events occurred in the record of the instant case. In addition, a different judge was assigned.

For the foregoing reasons we overrule appellant's assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

O'NEILL, P. J., of the Seventh  
Appellate District, concurs;  
VICTOR, J., of the Ninth  
Appellate District, concurs;  
Sitting by Assignment.

APPROVED:

/s/ JOSEPH DONOFRIO

*Judge of the Seventh Appellate  
District, Sitting by Assignment*

**JUDGMENT ENTRY OF THE COURT  
OF COMMON PLEAS**

(Filed September 10, 1980)

Case No. 79 CIV 0087

**IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO**

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**ROBERT J. KONDRAT, et al,**  
*Plaintiff,*

**vs**

**MORTON O'RYAN,**  
*Defendant.*

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**JUDGMENT ENTRY**

Defendant's motions as made in open Court February 15, 1980 and filed February 19, 1980 are hereby found to be well taken as hereinafter set forth.

Motion to Dismiss—this motion is hereby granted pursuant to Rule 12.9 of the Rules of Practice of the Common Pleas Court for Lake County for failure of plaintiffs to appear at the regularly set pre-trial of February 15, 1980 with no valid excuse being offered.

Motion for Summary Judgment—this motion is hereby granted on the basis that this is an action based on libel *per quod* and therefore special damages and economic loss must be pleaded and proved and plaintiffs have admitted through requests for admissions that they have not suffered any financial harm as a result of the remarks of defendant.

Motion for Summary Judgment based on legislative privilege—this motion is hereby granted for the reason that admissions established that defendant was a legislator making a statement relative to a piece of legislation under consideration at a legislative meeting and therefore the case of *Tanner vs Gault* 20 Ohio App. 243 controls.

The Court has ruled on all motions even though a ruling on any one motion in defendant's favor would dispose of the matter because an unrulred upon motion might be procedurally confusing in this case.

IT IS SO ORDERED.

/s/ ROSS D. AVELLONE

*Judge*

**JOURNAL ENTRY OF THE COURT OF APPEALS  
OF LAKE COUNTY, OHIO**

(Filed April 27, 1981)

Case No. 8-107

**IN THE COURT OF APPEALS OF OHIO  
ELEVENTH DISTRICT**

---

**ROBERT J. KONDRAT,**  
*Plaintiff-Appellant,*

vs.

**MORTON O'RYAN,**  
*Defendant-Appellee.*

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**JOURNAL ENTRY**

For the reasons stated in the opinion rendered herein, the assignment of error is overruled and it is the judgment and order of this Court that the judgment of the Common Pleas Court of Lake County, Ohio, is affirmed.

Costs to be taxed against appellant.

/s/ JOSEPH DONOFRIO, Judge, of the  
Seventh Appellate District, Sit-  
ting by Assignment—for the  
Court.

A11

**ORDER OF THE SUPREME COURT OF OHIO  
OVERRULING MOTION TO CERTIFY RECORD**

(Dated September 16, 1981)

No. 81-802

**THE SUPREME COURT OF OHIO  
THE STATE OF OHIO, CITY OF COLUMBUS.**

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**ROBERT J. KONDRAT,**  
*Appellant,*

vs.

**MORTON O'RYAN,**  
*Appellee.*

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**MOTION FOR AN ORDER DIRECTING  
THE COURT OF APPEALS  
FOR LAKE COUNTY  
TO CERTIFY ITS RECORD**

**It is ordered by the Court that this motion is over-  
ruled.**

**ORDER OF THE SUPREME COURT OF OHIO  
DISMISSING APPEAL**

(Dated September 16, 1981)

No. 81-802

THE SUPREME COURT OF OHIO  
THE STATE OF OHIO, CITY OF COLUMBUS.

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ROBERT J. KONDRAT,  
*Appellant,*

vs.

MORTON O'RYAN,  
*Appellee.*

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**APPEAL FROM THE COURT OF APPEALS  
FOR LAKE COUNTY**

This cause, here on appeal as of right from the Court of Appeals for Lake County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.